# THE AMENDMENTS TO THE ITALIAN CONSTITUTION.

Lieber divides constitutions into cumulative and enacted. The sole type of the former is to him the English Constitution, which has never had a fundamental charter as in all other modern constitutional states. Of the latter there are numerous and varied types which have common features in the manner in which the constitution is formed as the work of a few or of many who edit it and embody it in articles, attempting to interpret the new needs of a people.

Cumulative constitutions must be based upon the principle of parliamentary omnipotence. Enacted constitutions, unless they are intended to change into cumulative ones, must distinguish a constituent function of the legislative, prescribing special rules for the modification of the charter, and giving to the judiciary the judgment on the constitutionality of laws, thus arriving at the institution of a special court like the Supreme Court of the United States.

The Italian Constitution which was enacted at its origin has become cumulative in its development. It does not distinguish a constituent function in the legislative, nor does it give to the judiciary the interpretation of the constitutionality of the laws. Parliament has therefore never directly declared any intention to modify a single article of the constitution, but it has indirectly modified and interpreted several of them.

He who would seek to form an idea of the Italian Constitution from the eighty-four articles of the statute would obtain an incomplete and erroneous one. For a proper understanding one must follow instead all the changes which have been wrought by law, usage and neglect.

2. Not only at the first promulgation of the statute was it

thought in Piedmont that it was capable of modification by the ordinary legislative power; but many, influenced by French ideas, spoke freely of the constituent assembly.

In the throne address read by the royal representative, Prince Eugene of Savoy-Carignano, at the opening of the first Sub-Alpine Parliament on the eighth of May, 1848, it was said: "If the desired union with the other parts of the peninsula should be consummated, we shall promote such changes in the law as promise to aggrandize our destinies and to add to it that degree of power necessary for the good of Italy, should Providence lead us to that point."

At that time, the Senate replied as follows: "If to establish this unity of political powers, the king should ever find it necessary to effect the changes announced, though they have not been clearly defined to the Senate, the latter declares now that it has always had in view in its constitution the power of the Crown and the liberty of the people, but never the personal prerogatives conferred upon its members by the statute, which all are willing to return to the hands of the king, from whom for the sole purpose and with the sole desire of promoting the good of the State and of all Italy they have been received." The Chamber of Deputies, on the motion of Rattazzi, replied: "To-day when our votes are to accomplish the fusion with sister provinces, the Chamber views with pleasure, the day approach, when from universal suffrage there shall be evoked a constituent assembly which will form a statute upon the most liberal and popular basis, a statute which shall render strong, vigorous and glorious the monarchy which has for its aim the invulnerable principle of Italian independence."

In that period the Duchy of Piacenza adhered to Piedmont unconditionally, the Duchies of Parma and Guastalla with the condition among others, that the constitutions of new kingdoms should be reformed upon a broader basis. The Duchies of Modena and Reggio voted that the constitution should be as broad as possible. Lombardy attached

various conditions, among them that of a constituent assembly convoked by all the States upon the basis of universal suffrage which should discuss and establish the basis and form of a new constitutional monarchy under the dynasty of Savoy.

The proposed law presented to Parliament by the Sub Alpine Government for the union of these provinces provided in Article 8, "The electoral law for the constituent assembly shall be promulgated within one month of the acceptance of the fusion. Contemporaneously with the promulgation of the law itself, there shall be convoked a common constituent assembly which shall meet in as brief a period as possible." Article 9 established the basis for the electoral law for the constituent assembly. The ministry presented on the twenty-first of June the following additional provisions to the bill: "The constituent assembly has no other power, than to discuss the basis and the form of the monarchy. Any other legislative or administrative action of the same is void and without legal effect. The seat of the executive power cannot be changed except by act of Parliament."

It was feared at Turin that an attempt would be made to transfer the capital to Milan, a fear which colored the entire discussion of the project presented. The latter was in two parts, the first decreed the fusion and sanctioned in principle the convocation of the constituent assembly upon which it placed the limitations already mentioned, the second prescribed the rules for the election of the assembly. Both parts, after various events which it is useless to refer to here were adopted by the chamber, only to remain a dead letter through the unfortunate issue of the war of independence.

3. The address in reply to the throne speech at the opening of the second Sub-Alpine Parliament, adopted by the Chamber of Deputies on the second of March, 1849, says: "You who are surrounded by the elected representatives of the people and preserving the cares and honors by merit alone and we devoting our chief care to the regulation of

the finances, the municipalities, the national militia, the public instruction and the other civil institutions, give to the democratic principle the broadest extension which in a state of war is admissible. But only the constituent assembly of the realm could place our institutions in perfect harmony with the genius and with the needs of the century." In vain the deputy Degiorgi proposed that they should declare themselves competent to introduce into the statute those reforms the necessity of which was most generally felt. In vain Cesare Balbo, the eminent historian, and at one time president of the ministry, said that the omnipotence of Parliament was sufficient for all progress; the majority of the chamber was at that period of a contrary opinion.

4. Then occurred the defeat of Novara and the necessity for the Sardinian state of a period of recuperation. Public opinion abandoned all idea of a constituent assembly, and rallied to the opposite and conservative idea of the immutability of the constitution. They were led to this by the fear that the statute of Charles Albert might, like all the Italian constitutions of that period, come to naught.

On the same day on which the constitution had been published Cavour wrote in the *Risorgimento*: "The irrevocable promise which is embodied in the preamble of the statute is applicable literally only to the new and grand principles proclaimed in the same and to the grand fact of a compact destined to link together indissolubly the people and the king. But this does not mean that the particular conditions of the compact are not susceptible of progressive improvement, effected by the assent of the contracting parties. With the accord of the nation, the king may in the future introduce into the statute all the changes which may be dictated by experience and the needs of the future. But if such a power resides in the Parliament, declared omnipotent by us, the king no longer possesses it alone. A minister who would advise him to make use of it without consulting the nation would violate the constitutional principles and would incur the

gravest responsibility. Despite this as the Parliament remained silent, the constitution was surrounded by a species of fetichism which considered it "a sacred ark of covenant."

We have now reached a period when the Parliament was to be considered commendable in preserving acquired rights, when it is perfectly logical to maintain that the desire for something better would have destroyed the liberties, which though often limited, still shone from the Alps like a beacon to which gathered in time the other provinces of Italy. It is certain, that the convocation, in that perilous epoch, of a constituent assembly based upon universal suffrage would have added new fuel to the fire. Restricted by prudence, address and good-will, the conflagration could be mastered, but had the voracious flames been increased or allowed to gain ground, the statute would have perished.

5. After 1860 the modification of the constitution was again mentioned.

In discussing the law for the establishment of the Court of Accounts, which the Senate had returned to the Chamber modified by a proposal to appoint the members by royal decree upon the nomination of the ministry with the advice of the presiding officers of the two chambers, it was said that this infringed on Article 5 of the constitution, by which the king appointed all the officials of the state. In the session of July 26, 1862, Crispi maintained the competence of Parliament to reform the statute. Sella, Minister of Finance, instead said, "We consider it in truth our duty to hold the statute as a sacred ark, and never to abrogate it."

In the session of June 7, 1866, of the same Chamber, in discussing the bill for the suppression of religious corporations, D'Ondes-Reggio, in a long historical discussion and an exposition of comparative public law, maintained the necessity of a constituent power, since the bill infringed Article 1 of the statute, which could not be modified by the ordinary legislative power. Pisanelli replied to him that instead of being the ægis of a constitution, the power of a constituent

assembly is inimical to all the powers of the state, and made in proof an admirable contrast between France and England. The French Revolution had revised everything, and when the re-establishment was contemplated the public powers were constituted with the intention that they should limit and combat each other and be in relations of mutual distrust. The English doctrine is not based on antagonism and struggle, but upon the harmony and co-operation of all the powers.

This opinion of Pisanelli gradually begins to become more and more that of the Chamber of Deputies, just as science in Italy is to-day unanimous in holding that Parliament has the privilege of modifying the statute and that this system is preferable to the French method. The writer also believes that the contrast should be made with France rather than with the United States. Beneath its equilibrium of powers, that country has a large basis of institutional government derived from its English mother country, which protects it against any injuries which might come to it from the federal power, without its being in any way essential to maintain that the American Constitution, although enacted, represents exactly the result of a long social experience, or that the State constitutions adapted to the social conditions of the individual States constitute an efficient legal limitation of it.

In the Italian Parliament there have been manifestations of opinion contrary to the theory above expressed. They are not all equally authoritative and in explaining them it is necessary to bear in mind the occasions which gave rise to them. On the first of April, 1870, the deputy Salvatore Morelli debated a bill for the suppression of political oaths which he had himself introduced. The Prime Minister Lanza cited in opposition, its incompatibility with Article 49 of the constitution, and said among other things: "Whatever may be the opinion of each one of us on the privileges accorded to Parliament to discuss the statute, there can be no doubt that all the people, who have here the broadest elective representation admit that the fundamental statute by virtue of which

this representation exists, cannot be placed in question, except in extreme cases and through the medium of a constituent assembly.'' In this case the attack upon an important statutory provision, justified the response, borrowed by the way from the old Piedmontese ideas, which before many years had elapsed passed out of memory. On the eighth of June, 1870, in discussing some appropriations, the deputy Sonzogno digressed from his subject to demand a constituent assembly based on universal suffrage and to propose that it be placed on the calendar. But the Chamber which by its uproar and continual interruptions, had indicated its contrary opinion passed to the order of the day.

6. A little later Italy acquired the capital which geographically, socially and politically completed it. To regulate the position of the Pope in Rome the law became necessary which is known by the name of the pontifical guarantee.*

This law which created a personal sovereignty novel in the history of political science was without doubt of a constituent nature, and hence Bonghi, who reported the bill to the Chamber of Deputies wrote in his report: ''That a constituent power is perpetually active in the powers of the state, is better doctrine than that which claims that it must be called out every time with new force from the body of the people. The English doctrine and the practice based upon it of the implicit abrogation by means of laws which alter and change the constitutional conditions of the exercise of a right and its definition, is of greater utility than an explicit abrogation. Thus the constitution of a country becomes in fact the complex of its laws and becomes synonymous with the whole life of the people.'' In the debate on the law in the Chamber, on the second of January, 1871, Minghetti said, ''the Chamber is aware that I have never shown an absolute repugnance to the idea of a modification of the statute. I believe for my part that when the three powers of the state

* Translated in the note to Article 1 in the translation of the Italian Constitution, published by the Academy, p. 25.

are in accord, this reform, like every other, may be accomplished." The law was, moreover, voted under the auspices of the Lanza ministry which had expressed the opinion already noted in regard to the constituent assembly, incompatible with the facts embodied in the law of the pontifical guarantee.

This conception was authoritatively repeated in the Chamber in the discussion of the electoral law of 1882, which greatly enlarged the suffrage. In the session of July 23, 1881, Crispi said, "I do not admit the intangibility of the statute. Statutes are made to prevent governments from retrograding, not from advancing. Before us there can be nothing but progress. Intangible statutes cannot exist for many other reasons. If we retain immutable the fundamental law of the state, we desire immobility, and should throw aside all advances which have thus far been made by the constituted authorities. I understand that in the statute of Charles Albert nothing is said of revision, and this was prudent. But how should this silence be interpreted? It should be interpreted in the sense that it is not necessary according to the Italian Constitution that a constituent assembly should be expressly convoked, but that Parliament in its usual manner of operation is always constituent and constituted. Whenever public opinion has matured a reform, it is the duty of Parliament to accept it, even though the reform may bring with it the modification of an article of the statute." And Pisanelli, the Minister of the Interior, said in the same session, "The principle which, at the same time, is liberal and conservative, has become accepted among us that the constitution may be modified by the three constituted powers, without implicitly proclaiming the necessity of a constituent assembly by which with a strange contradiction we would desire to affirm the perfectibility of the legislative, and at the same time the immobility of the constitution. In countries where the constitutions do not prescribe a special method of revision, the British principle of the

omnipotence of Parliament is generally accepted, and it is inevitable that it should be so. This has occurred in states in which the constitution does not definitely prescribe a special method of revision, and it has occurred with us, when there have been innumerable modifications of the statute, so that we may say that such an interpretation is confirmed by the facts."

7. This scientific and parliamentary opinion to which I personally assent has not been associated with certain scientific manifestations in favor of the referendum, although such association would have been appropriate since laws of a constituent nature are those which give form and substance to the idea of popular sovereignty. The above mentioned tendency in Italy with respect to the constituent function, and the scanty following for the proposition of a referendum indicate that the direct participation in legislation is a fact far removed from Italian institutions, nor should this be surprising to Americans who have a direct participation not only in constitutional legislation, but also in ordinary law-making and in local option. Different institutions will arise with different social conditions. Italy, a young kingdom, yet inexperienced to freedom in all its lofty applications, progresses with its future assured, but has the misfortune to have been, a few years ago, infested by a blind and corrupt royal despotism, the traces of which cannot be readily eliminated. Of the North Americans it may be said that they do not know what despotism is, and no one marvels that liberty should attain among them the highest manifestations which are possible in the civil world. Italy has not yet eliminated from some, at least, of its institutions, such as the administration and the police, the despotic methods which tradition has bequeathed. Institutional self-government in America, which has traditions older than its adopted constitution, is far removed from our political and social conditions, and judgments must, of necessity, differ in the examination of constitutional usages.

The social and political conditions of Italy explain moreover the usage which has been emphasized of modifying the constitution by indirect methods, never directly attacking an article of the statute to abrogate it, modify it, or substitute another for it. The statute is, however, considered as something to be respected, something to be preserved, and hence there is some dread of touching it. On the other hand, as has been said, it cannot remain unchanged in all its particulars as it does not completely meet the needs of the country.

8. The Italian statute consists of three parts. One determines in general the principal rights and liberties referring, however, in the greater number of cases to particular laws. Another establishes certain definite rules or standards which do not require to be complemented, but are susceptible simply of modification, of addition or derogation.

A third part, which is the most delicate, sanctions a principle which in a representative government must be frequently applied to diverse cases, but of which one does not find, and cannot find, the various methods of application in written law.

From this division arise different consequences. Article 24 established the civil and political equality of citizens, referring to the laws for its application. Article 25 says that the citizens shall contribute indirectly in proportion to their possessions to the charges of the state. But it is the law which, in fixing the nature of the proportion gives a varied importance to the statutory provision, since it does not oppose the adoption of the progressive tax which by the way is improperly so-called, since it is an additional tax with a progressive character which the Giolitti ministry wished to propose. Articles 26, 27, 28, 29 and 32 refer to laws, yet if the limitation, the repression of abuses, the determination of the exercise of rights which the free man enjoys in all nations* make up the substance and constitute the essence

* That is the rights of assembly, of association, of the press, liberty of worship, the inviolability of the domicile, etc.

itself of liberty, it is not the statute but the laws, which secure political and civil equality, which guarantee more or less extensively according to the case, the various manifestations of individual liberty.

Articles 39, 40, 74, 75 and 76, relating to the electorate and eligibility, the communal and provincial institutions, the military levies, and the communal militia refer to laws, whence have issued an enormous mass of legislative precepts which Parliament has successively established, solely because the statute has called upon it to regulate so many different matters.*

But all this relating to laws of a constituent nature does not concern the modifications made in the statute which are to be referred to the second and third parts in the division which we have made of the constitution.

9. Article 1, which has given rise to so much controversy, belongs to the second category. Note that it is here said that the Catholic, Apostolic Roman religion is the sole religion of the state; other existing beliefs being tolerated in conformity with the laws. The words are open enough to leave no room for doubt; none the less the opinions respecting it have been changed through the disagreement between the State and the Church, by means of laws which the State has deemed necessary to enact in relation to certain principles of liberty, or simply by social convenience and also by political interest.

In the discussion alluded to for the establishment of the Court of Accounts, Crispi, to give additional value to his

* With respect to Article 76 it should be observed that many say that it has been violated, because the communal militia, which, according to French ideas, was embodied in the edict of March 4, 1848, which provides for this institution, does not correspond to the existing territorial militia which was established by the law of June 30, 1876. The communal militia of the State is a constitutional guaranty in the sense that it opposes to the armed force of the government an armed force of the citizens in the communes. The territorial militia is always an armed force of the government. The national guard was not, however, dispersed by the law of 1876; long before it had fallen into neglect, unable to resist a more homicidal weapon against men and institutions—ridicule. The law therefore only ordered a communal militia upon a different basis, after the citizens had in fact slighted the statutory guaranty in the form in which it had been given to them in the royal edict.

thesis, cited Article 1, saying that in the future it must be considered abrogated. The minister, Sella, replied that he did not believe the statute abrogated in anything, not even in Article 1. "It is the Clericals," he said, "who so often speak of that article as having been violated, but I am not able to believe that Crispi would make such a point." With an opportune interruption, Crispi signified to the minister that he was glad of an abrogation, but had not made a point of it.

Many times in the Chamber, particularly on the occasion of petitions which demanded the explicit repeal of Article 1, to which the Chamber has not wished to agree, this article has been discussed, and even a summary enumeration of what was said would occupy a large space. According to Chiaves, Minister of the Interior, in the session of March 24, 1866, Article 1 does not touch the liberty of conscience; that article merely saying that what the state may and will do should be done according to Catholic rites,—an admirable interpretation which is derived from the second part of the article, from the toleration of other cults. If Chiaves is scientifically correct that nothing in Article 1 interferes with the liberty of conscience, as that which belongs to the inner man can be neither guaranteed nor repressed since it is not given to penetrate into the thoughts of mankind, everything in Article 1 interferes with the liberty of worship, the constitutional guaranty of which is not sanctioned in the statute and which only later laws have recognized.

Lanza, president of the Council of Ministers, repeated the same idea in the session of March 8, 1872, if there should be any religious function at the occurrence of some national celebration it should be according to the ceremonies of the Catholic cult which is the general worship of the State.

This interpretation which minimizes the provisions of the article and is invented to evade the question, is not followed by science. In the acts of same parliament is to be found a document which accords with the opinion adopted by some

men of science, but which is not the more reasonable on that account. In a report of January 17, 1866, by the ministers, Scialoja and Borgatti, on the bill for the liquidation of the religious foundations it is said: "The Catholic religion is called that of the state in this article to indicate that it is professed by the great majority of Italian citizens. Any other interpretation is contrary to all reason, inasmuch as it does not belong to the lay power to impose beliefs and religious cults; and if this declaration was made with the intention of conferring special civil and political rights to those who profess a special religion, it would violate the law of equality apportioning all civil and political rights to all men without distinction, as citizens and not as professing a given religion."

But admitting the confusion between the people and the state which the article would create according to their interpretation, what these writers forget is that to be professed by a majority of the citizens does not lead to the conclusion that the Catholic religion should be *the sole* religion of the state. Conceding that the article does not involve special, civil and political rights to the Catholics, the sole logical interpretation, by the spirit and the letter, and by the legislation of the Sardinian States at the time the statute was promulgated is this: The statute denies the liberty of worship, tolerates within limits the existing cults, restricts the action of the state, prescribing that it shall not originate sovereign acts in opposition to the canonical laws of the Roman apostolic Catholic religion, to which it concedes a privileged position. The same statute in fact limits the liberty of the press, requiring the permission and recognizing the prohibition of the bishops for bibles, catechisms, liturgical books and books of prayers, which amounts to instituting a censorship in favor of the Catholic religion. The press edict of March 26, 1849, punishes offences against the religion of the state differently and more severely than those against permitted cults, conformably to the penal code which distinguishes

also infractions of the penal laws with reference to different cults.

To the ideas of the ministers, Scialoja and Borgatti, it might be further objected that the article is repugnant to the thought of modern times, but not to that of those in which it was promulgated. By a royal patent of February 17, 1848, Charles Albert had permitted the Waldensians to enjoy all the civil and political rights of other subjects, to frequent the schools in and outside of the universities, to obtain the highest academic degrees, but *for this reason to make no innovations in the exercise of their worship* and in the schools directed by them. The relation of this decree with the Articles 1 and 24 of the statute which soon followed it cannot be more manifest. The Waldensians did not, like the Israelites, enjoy the civil and political rights accorded to the Catholics. Some were conceded to them in the patent cited but their religion remained only tolerated. Others were granted in the decree of March 26, 1848, but *nothing which made an innovation in their worship* or the schools directed by them. But not enough! The law of June 19, 1848, "wishing to remove any doubt as to the civil and political capacity of citizens who did not profess the Catholic religion," declares that, "difference of worship does not form an exception to the enjoyment of civil and political rights, and to eligibility to all civil and military positions." This was the first indirect reform of Article 1 of the statute.

To corroborate this which is the only rational interpretation of the article, it is sufficient to remember, that the churches and other places belonging to the Catholic institutions enjoyed immunity in the Sardinian state, that ecclesiastics enjoyed judicial privileges having special courts for civil and criminal processes—an immunity and privileges which the law of April 9, 1850, abolished, Parliament continuing to pursue a path which should distinguish the Church more and more from the State, and modify Article 1 as it came from the minds of the editors of the statute.

10. After this it will suffice to indicate the principal laws which are in opposition to Article 1.

The law of May 29, 1855, suppressed the religious orders which did not apply themselves to preaching, education or the care of the sick, the chapters of colleges with exception of those having the cure of souls or those existing in cities with a population of 20,000 inhabitants, and the simple benefices to which were attached no religious services and which were solely of advantage to the incumbent. It referred to the ordinary tribunals the ascertainment whether a benefice was comprised in the categories mentioned, and instituted the ecclesiastical treasury. Upon this law were modeled the decrees of December 11, 1860, for Umbria; January 3, 1861, for le Marche, and February 17, 1861, for Naples.

The law of August 10, 1862, ordered the valuation of the rural properties of the Church in Sicily, and by another law of the twenty-first of the same month and year, the properties which had devolved on the ecclesiastical treasury passed into the domain of the state, which paid them in so much rents to be inscribed in the name of the treasury.

But that which most directly opposes the provisions of Article 1, is civil marriage, sanctioned by the civil code, which does not demand nor recognize religious matrimony, and permits any person however related ecclesiastically to contract civil matrimony.

The bill for a divorce has not been taken up, though it has been repeatedly presented to the Chamber of Deputies, by way of parliamentary initiative by Villa, who, though he has been Minister of Justice, is no more able to overcome the resistance of public opinion, which is in a large measure Catholic, than that of Parliament. He has not been able in leading the small number of different religion or atheists to make headway against the enormous majority.

Another proposition which caused much excitement in the last parliamentary session would also imply a modification

of Article 1, namely, the obligatory precedence of civil matrimony over the religious, which is reputed to be a great conquest for liberty, but which would not in truth be so. Church and State pursue their respective ways freely and independently, the latter not recognizing the marriage tie contracted according to the rules of the confession to which the persons belong, has done all in its power; any other step would limit the liberty of the Church and the individual in a reprehensible manner. This project, so far from being a step in the direction of liberty as divorce would be, is a step which accentuates the conflict between Church and State which by the acquisition of Rome by Italy has assumed an acute phase, and it is on incontestable principles that laws of conflict of resistance and also of defence are illiberal laws.*

The civil code was followed by the laws of suppression of July 7, 1866, and August 15, 1867. By the first the corporations, the congregations, the conservatories which established life in common and which had an ecclesiastical character, were abolished as legal persons; the ecclesiastical property was converted into public rents, the appropriations for religious purposes were substituted for the ecclesiastical treasury. By the second the suppression was extended to religious foundations with a reversion of the same to the public domain or to the founders or to their patrons, including all the corporations for purposes of worship except the

* It is worth while to recall the comparative legislation. In Germany the dispositions in question are derived from a condition of conflict with the Catholic Church, though it is true that marriages in extremes not permitted by the Protestant religion are not excluded from punishment. In France the dispositions are derived from a concordat, *i. e.*, from the reciprocal assent of the State and the Church. In Belgium when the French penal legislation had been in full vigor, its abolition did not give good results, and it was re-established as concerns these parts. With Portugal and some of the cantons of Switzerland it would hardly be profitable to concern ourselves.

Certainly the state has the right to prevent abuses when they are grave and numerous, justifying this restriction of liberty by the political and social necessity, but in Italy there is no such necessity. The great majority of the clergy do not admit to ecclesiastical marriage unless the civil marriage has been consummated, except in cases which are worthy of a certain consideration. When it is not indispensable there exists no reason for the intervention of the state.

Episcopal Sees, the Chapters, the cathedral and metropolitan churches, the seminaries, the parochial benefices and curacies. The State thus acquired thirty per cent of the entire patrimony of the Church. But not enough, the law of August 11, 1870, suppressed in the cathedrals the canons in excess of twelve in number and in other benefices the chaplains in excess of six, and ordered the conversion of the real property of the ecclesiastical administration.

It is unnecessary to reproduce the law of pontifical guarantee already cited: it will suffice to add that the special law promised in Article 18, to provide for the reorganization, the preservation and administration of church property in the kingdom, has up to the present time not been enacted. But the laws of June 19, 1873, those of July 7, 1866, and August 15, 1867, considered above, were applied to the province of Rome, with some more favorable modifications and exceptions in harmony with the ideas expressed in the law of the guarantee.

The movement toward the liberty of religion and the separation of the Church from the State has not stopped at this point in Italy. The law of June 7, 1875, abolished the absolute exemption of the ecclesiastics from the military conscription. On the thirtieth of June, 1876, appeared the law which modifies the formula of oaths in civil and criminal trials, which till that time had been based on Catholic beliefs.

In the year 1887, two laws modified the exceptional dispositions favorable to the city and province of Rome. That of June 9, without prejudicing the law of 1873, authorized the appropriation from the special fund of the charity and religion from the church property of Rome, the annual sum of 120,000 francs as a contribution to the payment of the interest and amortization of the loan made by the Savings Bank of Milan to the city and province of Rome for the re-establishment of the charitable institution of S. Spirito at Rome. The other law of July 14 entrusted to the general

public debt office, the administration of the special fund for purposes of charity and religion in the city of Rome, constituted in virtue of the law of 1873, and ordered the completion of the operations for the liquidation of ecclesiatical property in the province of Rome.

Finally the charities law of July 17, 1890, ordered the concentration in the council of charity of the eleemosynary institutions of the public institutions of beneficence with an income not exceeding 5000 francs, and other like institutions; gave to the council of charity the administration of the funds of other charitable institutions except those which serve to supplement and complete other forms of benevolence exercised by institutions not subjected to the concentration, established purposes more secular and more adapted to the times to devote to them the revenues formerly destined for eleemosynary purposes; ordered in favor of the present and permanent interests of benevolence, the transformation of institutions, which had come to fail of their purpose, or of which the purpose no longer corresponded to the interests of public benevolence, and those of which the purpose was already amply and permanently provided for in another way.

After this summary exposition of the most notable provisions of the principal laws which have radically modified Article 1 of the statute, one should recall that the new penal code of Italy has suppressed any distinction between forms of worship, which had remained in the Sardinian code despite the modifications which had been made. The various cults are no longer distinguished but are spoken of collectively as cults permitted in the state—among which the old Catholic cults are also admitted—which implies neither tolerance nor suppression of liberty since every cult is free with the simple limitation, that it shall conform to the social conditions, shall not alter the social institutions, nor disturb the moral order.

11. The Article 18* of the statute has also been modified

*Gives to the King exercise of civil power in matters pertaining to ecclesiastical benefices.

by the repeatedly mentioned law of guarantee, and has been enlarged by the law of the Council of State, according to which the approval of that body must be obtained in the execution of the ecclesiastical provisions of all kinds, and the fourth section pronounces also on the merits of the assumption of the temporality of the provisions concerning the attribution of civil and ecclesiastical custody respectively, and of the provisional acts of general security relative to this matter.

The last sentence of Article 28, which is to be understood as embodied in the last paragraph of Article 2 of the law of guarantee, has also fallen into disuse.*

12. The laws which have carried out Articles 19, 20 and 21 † of the statute we shall not recall: since they treat of minor questions which have no special constituent importance, and since from our point of view these articles do not belong to any of these categories into which we have believed it admissible to divide the statutory provisions. This reference to laws does not as we have already discussed imply that the real guarantee consists of the laws; the Articles 19, 20 and 21 give the principles which are not altered in their embodiment in laws, whereas in the other cases, it is from the laws themselves that the principles are derived.

Nor is there any need of a long explanation of the fact that the first sentence of Article 19 has been derogated many times since this article is included in our second category. The reasons for this disregard are evident; and it is equally evident that the statute has been modified. By the law of March 16, 1850, the dotation of the crown in the reign of Victor Emmanuel was determined; by the laws of March 16, 1860, August 10, 1862, February 5, 1868, May 21, 1876, May 31, 1877, the dotation of the crown during the same reign was modified, augmenting or diminishing according to various circumstances—enlargement of territory or financial conditions—which gave rise to these laws.

* Approval of bishops for liturgical books, etc.

† Civil list of Crown, private property of the same and civil list of heir apparent.

13. Much more important is the modification which the Articles 53 and 54* of the statute have experienced, whether we consider the substance of the matter or the manner in which it has been done which involves the formal constitutionality of the laws in Italy.

The Article 54 however has been disregarded only in an indirect way, inasmuch as the deliberations always have provided for the majority of the votes, but if the quorum is not constituted of one half the members who compose the Chamber and one additional member as the statute provides in Article 53, the minimum demanded by the statute for the passage of a law is of necessity reduced.

It is intended that among the members composing the Chamber of Deputies, there should not be included the vacant seats, nor the seats of districts which have elected a person elected simultaneously for other districts, nor the members elect who have not taken the oath of office, but only those who are legally admitted to the Chamber on the day when the quorum is to be determined, such being the precise provision of the statute. The majority of the members is not the majority of those necessary to complete it, but of those who actually constitute it. The demonstration becomes superfluous if we bear in mind that Article 53 speaks with the same phrase of the Senate, where the number of members by the same statute is not limited, and where by the same statute the appointments must be certified. Nor may a Senator be admitted to the exercise of his functions until he has taken the oath of office. Only those senators who are in the exercise of their functions can be counted as senators in the determination of a quorum.

Some of these conclusions which must be scientifically admitted as the basis of the letter and spirit of the statute, were adopted by the Chamber of Deputies of the Sub-Alpine Parliament on December 20, 1849, and November 12, 1850, after having been discussed somewhat at length in the

*Mode of passing bills and quorum.

sessions of December 23, 1848, February 3, 4 and 6, 1849. But the subtraction of the vacant seats and the multiple elections from the total number of 204 deputies, who then formed the chamber, was often not enough to obtain a quorum. Hence Deputy Broglio proposed for the first time to exclude from the computation, deputies absent on leave, deputies whose election had not been confirmed, or who had not taken the oath of office, a proposition which was withdrawn before an attack by D'Ondes-Reggio, as it appeared to savor of constitutent power.

In the session of March 1, 1863, in voting the rules of the Chamber, it was determined that the deputies in regular leave of absence should not be computed in the quorum. On that occasion the reporter, Boncompagni, said that the rules could not prescribe nor could the statute require that these provisions be carried out without taking into account the insuperable obstacles which might prevent a number of members sometimes quite considerable from taking part in the labors of the Chamber. Being moreover supported by the authoritative example of the Senate, the proposition was adopted as we have said.

On February 19, 1864, a proposal which had no further consequences, was read by the deputies, Crispi and Petruccelli, according to which the quorum should be reduced to one-fifth of the actual members of the Chamber, except for voting the budget and new taxes which should fall under the provisions of Article 53 of the statute.

In the rules of 1868 those absent in the service of the Chamber are put on the same footing as those on leave of absence, and to-day the quorum is determined in this way, while in the Senate besides those on leave of absence, senators who are prevented by causes independent of their own volition from being present are not counted. In view of the advanced age of the greater number of them, the quorum is thus excessively reduced.

Thus by way of internal regulation, the two chambers,

after separate and distinct deliberations, have profoundly modified by direct action an article of the statute.

The provision of Article 55 of the statute, so far as it relates to the preliminary examination of proposed laws, has had additions and amplifications from the rules of the two assemblies, without any substantial modification.

Thus by its rules, the Chamber of Deputies has added to the methods of voting prescribed in Article 63 of the statute,* that by the call of the roll.

14. The Article 33 requires that senators shall have completed forty years of age, but at the close of its first session, the Senate admitted Senator Cataldi, who had not attained the age prescribed, though it did not permit him to vote, but only to take part in debate. The same has since been done in the cases of eleven other Senators.

This does not of course directly conflict with the statute, but it constitutes an interpretation of the article made by supplementing the article by the power of a single chamber distinct from the other, which has consistently annuled the elections of all who upon the day of election had not completed the thirty years required.

15. The committees of Pica and Crispi of August 15, 1863, and May 17, 1866, and the extraordinary military tribunals imposed upon the legislative power by abnormal conditions of the public safety, suspended temporarily the Article 71 of the statute, not in that it prohibits the taking of individuals from their ordinary legal jurisdiction which would have been the case in exceptional laws, but in that it prohibits the creation of extraordinary tribunals and commissions.

More serious, however, is the repeated provisional breach with the establishment of the martial law of Article 6, which prohibits the king without exceptional cause to suspend the laws or dispense from their observance. Five times such an occasion has arisen, for Genoa in 1849, Sassari in 1852, for

* Provides for rising, division and secret ballot.

Naples and the Neapolitan and Sicilian provinces in 1862, for Palermo in 1886, for Sicily and Lunigiana in 1894.

Excluding 1866 because the government had complete power from the legislative branch, where it might be deemed that the suspension of constitutional guarantees had the force of law—in all the other cases in which the government has proclaimed martial law, it must be considered in the sense of a partial suspension of the constitution, not, however, in the Anglo-American sense of the simple repression of a sedition by armed force, but in the French sense of a state of siege. Certainly the government has in cases of necessity the right and the duty to defend itself. But in all the cases mentioned, this necessity was not self-evident, nor is it admissible to proclaim military tribunals, which occurred for the first time in 1894, tribunals which arrogated to themselves the power to judge of facts anterior to their establishment, though connected with the facts which provoked the declaration of martial law. The Supreme Court in criminal matters in Italy has, however, justified this theory. Parliament has not felt it necessary to pass a bill of indemnity, which the government in the other cases has disdainfully refused, saying that it had applied the law.

The law is said to be found in the military penal code which permits the proclamation of a state of siege in the case of invasion by a hostile army. But how can, as a restriction of liberty, the invasion of a hostile army furnish an analogy in the case of internal sedition? And yet this has been allowed in Italy, and with the authority of the Chamber of Deputies and the judicial power.

16. The law of December 30, 1882, on the oaths of deputies, gives an interpretation and an amplification to the Article 49 of the statute, declaring invalid the election of deputies who refuse, pure and simple, to take the oath of office, or who do not take it within a period of two months after the confirmation of their election, except in case of a legitimate impediment. It may truly be said that

those who have power to interpret have indeed power to modify.

17. The law of December 6, 1865, upon the organization of the judiciary, is supposed to have embodied in Articles 199-212 the immovability of the magistracy which is recognized in Article 69 of the statute without referring to a special law. But the needs of the service place judges who are theoretically immovable, at the discretion of the ministry, and this renders illusory the constitutional provisions, though furnishing certain guarantees in regard to their absolute retirement and removal from office.

But it certainly does not suffice merely to maintain them in office; for, so long as the executive power can transfer a magistrate from Pachino to Susa, promote him and decorate him, entrust honorable and lucrative charges to him, and vice-versa can leave him for his natural life in any position whatever in the same grade and without honors or duties; the magistracy is not to be considered constitutionally immovable and much less independent. Yet the magistracy in Italy is superior to the position created for it morally and financially; many facts could be cited, which redound to the honor of the Italian judges, but, on the other hand, some few facts perhaps explicable by the constitutional law in the matters which are worthy of censure.

It has often been contemplated to establish seriously the immovability of the magistracy, but free government is too recent for such efforts to have gained sufficient importance and weight to attain their end. It was contemplated by the ministers, Villa and Pessina, who, in decrees of January 4 and 27, 1880, and December 14, 1884, instituted a consulting commission for the promotion, the nomination and payment of magistrates. Parliament has often thought of it without making any radical law.

As we have said, free government is too recent for the traditions of absolutism to be removed from everything. Many still think in Italy that the judiciary is not an autonomous

power, but simply a dependence of the executive like the administration, and the belief is widely spread also among men of science. They had efficient interpreters in the commission to edit the new penal code, where it is said that powers of the state are two only, the legislative and the executive. The statute also does not speak of a judicial power, but of a judicial organization.

18. To the last part of the statute, to that we may remember, which sanctions the principles by which the form of government is determined belong Articles 2,* 5,† 65 ‡ and others which it is not necessary to point out. These articles have been modified and even contradicted by constitutional practice and usages.

The state is in law a representative monarchical government, which to-day with the development which it has had may be called parliamentary. The executive power does not belong to the king alone, as Article 5 of the statute would have it, but the king participates in the executive with the cabinet system. The king is the chief of the state, the president of the ministry is chief of the executive.

This notion of the government is eliminated moreover from Article 65 which Italian practice has not respected. The letter with its externals remains, since the king issues decrees appointing and removing ministers, but the spirit is not that which follows from the statute as it is the Chamber of Deputies which by its votes determines the appointment and removal of ministers.

19. But in addition to all the constitutional laws and usages which form integral parts of the parliamentary institutions, there exist in laws, in decrees, and in practice many provisions which in the most restricted significance are of a constituent character.

Article 8 of the statute says merely that the king may

*Declares the state a representative monarchical government.
†Establishes power of the King.
‡"The King appoints and dismisses his ministers."

grant pardons and commute sentences. The penal code and the law of penal procedure give to the king the prerogative of amnesty and of pardon, determining its purpose, its methods and its effects.

Article 32 speaks only of the right of assemblage. Various habits without a law, which would be difficult and perhaps objectionable, recognize in Italy the right of association.

Of the right of perquisition the statute is silent, but the Parliament has recognized it under the head of examination of the public service, the social activities and personal responsibility of deputies, senators and ministers.

20. Besides all this movement of legislation and custom, the reform of the composition of the Senate has been agitated. This movement originating in the field of science has penetrated the superior chamber itself which from time to time has occupied itself with the question unofficially.

The present prime minister, Crispi, is known to be favorable to the reform of the Senate, since during his previous ministry, the studies which were made in the Senate itself, had had a noticeable increase, although it is to be remembered that the Senate and Crispi himself halted before the difficulty of choosing a different composition for the upper Chamber.

The first explicit indication of a desire to reform the Senate was given in the session of March 31, 1886, by a declaration of Prime Minister Depretis in replying to Senator Alvisi. Before that time Senator Lampertico, reporting the bill for the modification of the electoral policy, which became law in 1882, spoke in a general way of the superior influence which the Chamber of Deputies had acquired, and between the lines under these circumstances touched upon the possibility of a different composition of the Senate.

On the ninth of April, 1886, occurred an assembly of senators to study this serious problem. Out of it grew a commission of six members which reported to the Senate in secret committee in July, 1887.

Crispi fell in 1891 and the movement was everywhere arrested, having again risen to power a year later the matter is again considered. Propositions have been made indirectly in the Senate, but they have no great following. According to rumor it is not wished to modify the statute directly but to make the choice fall upon persons belonging to twenty-one categories proposed for the body, in Article 33 from which should be drawn a number three times the number of Senators to be named, from which the Crown should select the names.

It is evidently no solution. Without a modification of the statute we shall never have in Italy an upper chamber of greater influence and importance than the present.

21. From the foregoing exposition the following inferences are evident: that the Italian Constitution no longer consists of the statute of Charles Albert, that this forms simply the beginning of a new order of things, that many institutions have been transformed by laws, decrees, usages and neglect, by which the Italian Constitution has become cumulative, consisting of an organism of law grouped about a primary kernel which is the statute.

Nor has the movement been arrested. Constitutional laws are proposed nearly every moment, for example, the indemnification of deputies, and it is worthy of commendation that Parliament proceeds slowly and cautiously in such reforms. But it is not venturesome to say that the reforms will be continued, that the evolution toward a greater perfection will be continuous and permanent in the Italian Constitution, which by the attitude of the people, by the absence of exaggeration and by their love of liberty, is destined for a glorious future.

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